



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1979-58

of

COMMISSIONER FRANK P. REICHE

By approval of Advisory Opinion 1979-58, a majority of the members of the Federal Election Commission have declared that the continuing payment by a law firm to one of its senior partners of the same compensation he currently receives, even though he will be spending less time on firm matters in the future as a result of engaging in fundraising and political activities for the Carter/Mondale Presidential Committee, does not, even in part, constitute an in-kind contribution by the law firm to the Committee. I respectfully dissent from this view and believe that it is contrary to the facts stipulated in the Advisory Opinion Request. According to the party requesting this opinion, "the senior partner of a law firm wishes to engage in fundraising and political activities for the Committee as a volunteer. The time devoted to these activities would occur during normal business hours and also during evenings and weekends." The requesting party also indicates that the senior partner's compensation is not tied to the number of hours he works, but rather is based upon "his proprietary or ownership interest in the firm which reflects a variety of historical factors, including seniority of service in the firm, stature in the Bar, ability to attract clients, effectiveness in problem solving, value as a counselor to other attorneys in the firm, and the like." It is obvious from the Commission's discussion that the Commissioners approving this Advisory Opinion relied heavily upon the proprietary theory of compensation supposedly governing compensation for the senior partner in question. Even though this was the representation made to the Commission by the requesting party, I would suggest that such a theory of law firm compensation to an active participant in a law practice is contrary to the prevailing practice of the American Bar. Unless a member of a firm is retired or semi-retired, or unless the firm has substantial capital for which such senior partner is partially responsible, it is very unusual to compensate partners of American law firms in accordance with some vague notion of their proprietary interest in the firm. At best, one's proprietary interest in a law firm normally plays but a small part in determining an individual partner's compensation. Regardless of such prevailing practice, and assuming *arguendo* that the compensation of this particular senior partner is as stated in the request, one need but refer to the "historical factors" cited by the requesting party in order to discern that it is substantially more than his proprietary or ownership interest in the firm which determines his compensation. I refer specifically to the listing of such factors as "seniority of service in

the firm, stature in the Bar, ability to attract clients, effectiveness in problem solving, value as a counselor to other attorneys in the firm and the like." It is entirely possible that one's stature in the Bar may be enhanced by volunteer political service of the type contemplated in this instance. It is also possible, particularly if the senior partner involved is fortunate enough to be working for a candidate who eventually emerges as the winner in an election, for one to improve his ability to attract clients. In this connection, however, I would suggest that many clients are interested not merely in the law firm with which a particular lawyer is associated, but also in knowing that the attorney who attracted them to such firm in fact maintains an active relationship with that firm. To the extent that the senior partner in this case would be spending less time with the firm, his ability to attract clients might suffer. It is, however, when you consider the other factors taken into account in determining this partner's compensation that the proprietary or ownership interest theory advanced by the Requestor falls woefully short of the mark. Unless a firm gives seniority credit without regard to an individual's actual participation in the firm's practice, a partner's absence or lessened involvement in the life of the firm would impair his usefulness to the firm. Furthermore, a law partner cannot demonstrate effectiveness in problem solving unless he is actually involved in the work of the firm. Therefore, to the extent that this particular senior partner proposes to decrease his work on behalf of the firm, he is thereby decreasing the contribution which he could otherwise make in the problem solving area. Finally, it is quite obvious that an attorney cannot be a counselor to other attorneys in the firm if he is not available to them. Here again, to the extent that this senior partner will be spending less time with the firm, his value in this respect will be diminished. A majority of the commissioners expressed the view that this factual pattern was distinguishable from that in Advisory Opinion 1978-6 where the compensation of a partner spending time away from a law firm on political matters was dependent, at least in part, on the number of hours the partner recorded as client work for the firm. Although the precise number of hours spent by the senior partner in this case is not listed as one of the factors determining his compensation, a brief review of the factors recited by the requesting party leads me to conclude that the amount of time spent by this senior partner on behalf of the firm does indeed affect the level of his compensation from the firm, as was the case in the circumstances which prompted Advisory Opinion 1978-6. There are those who liken political activity such as is proposed here to pro bono public service or charitable activity. Commendable though it is that an individual such as this senior partner contemplates spending considerable time on behalf of a political candidate, I would suggest that time so spent does not necessarily redound to the benefit of the firm in the same manner as time spent in some pro bono capacity for a governmental body or time spent working with charitable organizations. It is thus my conclusion that the senior partner in this case, who, by admission of the requesting party, will be spending less time on behalf of his law firm, will thereby diminish the extent to which he can contribute to the firm in terms of those factors which the firm considers significant in determining his compensation. For this reason it is my opinion that the law firm will be making an in-kind contribution to the candidate for whom such senior partner performs volunteer duties. I, therefore, dissent from the opinion approved by the other members of the Federal Election Commission.

March 5, 1980